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Agathisfour Sdn Bhd v Papparich Group Sdn Bhd

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HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-104-02 OF 2020
ONG CHEE KWAN JC
24 DECEMBER 2020

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Contract — Specific performance — Factors to be considered — Plaintiff, defendant and third party entered into share-sale agreement and shareholders agreement under which defendant was, inter alia, required to settle debts owed by defendant and its subsidiaries to third party and its subsidiaries — Defendant became insolvent and could not carry out its obligations — Whether in such circumstances plaintiff's application for an order that defendant specifically perform its obligations and pay damages was not only fruitless but, if granted, could cause defendant and its directors to breach the law in their attempt to comply with the order

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Vide the instant originating summons ('OS'), the plaintiff applied for an order for specific performance against the defendant in respect of two clauses in two agreements entered into between the plaintiff, the defendant and a third party ('PMSB'). The two agreements were a share sale and subscription agreement ('SSA') and a shareholders agreement ('SHA'). The two said clauses obliged the defendant to repay or cause to be repaid debts owed by the defendant and its subsidiaries to PMSB and its subsidiaries within specified timeframes. The plaintiff's instant application to court was for an order compelling the defendant and its subsidiaries to specifically perform the said obligations. The plaintiff alleged that due to the defendant's failure to perform the obligations it had suffered loss due to the diminution in the value of its shares in PMSB but since the defendant was insolvent (two winding up petitions had been presented against it), it was futile to obtain an award of damages against the defendant, hence the reason for the application for an order for specific performance.

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Held, dismissing the OS for the following reasons:

(1) In the OS, the plaintiff sought specific performance of cl 7.2 of the SHA and cl 5.1(b) and (c) of the SSA by the defendant and its subsidiaries AND for damages to be assessed. Since the subsidiaries were not parties to the two agreements, no order for specific performance could be made against them. Secondly, having elected to affirm the agreements, the plaintiff could not ask for damages which was based on the alternative basis of termination of the agreements (see paras 9–10 & 71).

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(2) An order for specific performance was clearly unsuitable in the instant case because it would compel the defendant to act contrary to a statute, namely, the Companies Act 2016 ('the CA 2016'). Under s 472 of the CA 2016, any disposition of a company's property after the presentation of a winding up petition was void unless ordered otherwise by the Court. A specific performance order would compel the defendant to make payments to Paparich Malaysia group of companies and Roti-Roti International Sdn Bhd. This would constitute a void disposition unless it was validated by the winding up court. Such payments could also potentially amount to undue preference under s 528 of the CA 2016 if the defendant was wound up within six months from the date of the payments (see paras 12–14 & 16).

(3) Specific performance would not be ordered against a party which was in no position to perform the order. A specific performance order would be futile if the defendant was insolvent and had no means to meet the obligation to pay (see para 17).

(4) The plaintiff's claim was rendered infirm by the 'reflective loss' principle. Where the plaintiff's claim was for losses it had suffered in its capacity as a first-degree shareholder of PMSB in the form of diminution in share value or its distribution consequent upon the loss sustained by PMSB, and in respect of which PMSB had a separate cause of action against the defendant, the 'reflective loss' principle would bar the plaintiff as shareholder from suing the defendant since the proper party to make the claim would be PMSB itself for breach by the defendant of its obligations under the two agreements (see paras 20, 22 & 28–29).

(5) The defendant's insolvency was not sufficient reason for the court to grant an order for specific performance instead of damages. The court had to consider if third parties would be prejudiced if specific performance was granted. In the context of the instant case, if the defendant was ordered to specifically perform its undertaking to settle its subsidiaries' debts to PMSB's subsidiaries, this could prejudice the defendant's other creditors who would only be entitled to share *pari passu* in the remaining assets of the defendant, if any. There was also no evidence before the court that the defendant's subsidiaries had the ability to pay their debts to the subsidiaries of PMSB. An order of specific relief against the defendant in such circumstances might unnecessarily expose the directors of the defendant to the possibility of contempt of the court order (see paras 42–43 & 45).

(6) Specific performance would not be ordered if the order was uncertain in its scope, for example, if there was uncertainty as to the actual amounts of the debts or if the amounts could only be determined after much effort at computation. The court could not be burdened with the task of supervising the execution of and compliance with a specific performance

order or to interpret the scope of the obligations or to resolve incidental issues arising from the settling of accounts. Not only would this protract the litigation and increase costs, but it would also require unnecessary investment of precious judicial time which the court was not inclined to do (see paras 46–47 & 51–54).

[Bahasa Malaysia summary

Melalui saman pemula ('OS'), plaintif memohon untuk perintah perlaksaan spesifik terhadap defendan berkaitan dengan dua klausa dalam dua perjanjian yang dimasukki antara plaintif dan defendan dan satu pihak ketiga ('PMSB'). Dua perjanjian tersebut merupakan perjanjian penjualan dan langganan saham ('PPLS') dan satu perjanjian pemegang saham ('PPS'). Dua klausa tersebut memberikan tanggungjawab kepada defendan untuk membayar semula atau menyebabkan pembayaran semula hutang yang terhutang kepada defendan dan anak syarikatnya kepada PMSB dan anak syarikatnya dalam tempoh masa yang ditetapkan. Permohonan plaintif kepada mahkamah adalah untuk satu perintah untuk memaksa defendan dan anak syarikatnya untuk melaksanakan tanggungjawab tersebut. Plaintif mengatakan bhawa atas sebab kegagalan defendan untuk melaksanakan tanggungjawabnya plaintif telah mengalami kerugian kerana pengurangan jumlah nilai sahamnya dalam PMSB akan tetapi atas sebab defendan tidak solven (dua petisyen penggulungan telah dikemukakan kepadanya), ianya adalah sia-sia untuk mendapatkan satu awad ganti rugi terhadap defendan yang merupakan alasan permohonan untuk satu permohonan perlaksanaan spesifik.

Diputuskan, menolak OS untuk alasan berikut:

(1) Dalam OS tersebut, plaintif memohon untuk perlaksanaan spesifik cl 7.2 PPS dan cl 5.1(b) dan (c) PPLS oleh defendan dan anak syarikatnya DAN untuk kerugian ditaksirkan. Memandangkan anak syarikat bukan pihak kepada dua perjanjian tersebut, tiada perintah untuk perlaksanaan spesifik boleh dibuat terhadap mereka. Kedua, kerana telah memilih untuk menandatangani perjanjian tersebut, plaintif tidak boleh memohon untuk ganti rugi yang berdasarkan alasan alternatif untuk penamatan perjanjian tersebut (lihat perenggan 9–10 & 71).

(2) Apa-apa perintah untuk perlaksanaan spesifik adalah tidak sesuai dalam kes ini kerana ianya akan memaksa defendan untuk bertindak bercanggah dengan statut, iaitu Akta Syarikat 2016 ('AS 2016'). Dibawah s 472 AS 2016, apa-apa keadaan harta syarikat selepas pengemukaan petisyen penggulungan adalah terbatal kecuali mana di perintahkan sebaliknya oleh mahkamah. Satu perintah perlaksanaan spesifik akan memaksa defendan untuk membuat pembayaran kepada kumpulan syarikat Paparich Malaysia dan Roti-Roti Internasional Sdn Bhd ini akan terjumlah keapda satu keadaan yang terbatal kecuali mana ianya disahkan oleh mahkamah penggulungan. Pembayaran sedemkian

juga berkebarangkalian akan terjumlah kepada satu keadaan khas yang salah dibawah s 528 AS 2016 sekiranya defendan digulung dalam masa enam bulan dari tarikh pembayaran (lihat perenggan 12–14 & 16).

(3) Perlaksanaan spesifik tidak akan diperintahkan terhadap satu pihak yang tidak berada dalam kedudukan untuk melaksanakan perintah tersebut. Satu perintah perlaksanaan spesifik akan sia- sia sekiranya defendan tidak solven dan tiada cara untuk memenuhi tanggungjawab untuk membayar (lihat perenggan 14).

(4) Tututan plaintif dijadikan cacat berdasarkan prinsip 'reflective loss'. Yang mana tuntutan plaintif untuk kerugian yang dialaminya atas kapasitinya sebagai pemegang saham tahap pertama PMSB dalam bentuk kekurangan nilai saham atau pengedarannya sebagai kesan kerugian yang dialami oleh PMSB, dan yang mana PMSB mempunyai satu kausa tindakan yang berbeza terhadap defendan, prinsip 'reflective loss' akan menghalgn plaintif sebagai pemegang saham daripada menyaman defendan sejak pihak yagn sepatutnya membuat tuntutan adalah PMSB sendiri untuk pelanggaran tanggungjawab defendan dibawah dua perjanjian tersebut (lihat perenggan 20, 22 & 28–29).

(5) Keadaan tidak solven defendan bukan merupakan alasan yang memadai untuk mahkamah memberikan perintah perlaksanaan spesifik dan bukannya ganti rugi. Mahkamah harus menimbangkan sekiranya pihak ketiga akan terprejudis sekiranya perlaksanaan spesifik diberikan. Dalam konteks di sini, sekiranya defendan diperintahkan untuk melaksanakan akujanjinya untuk menyelesaikan hutang anak syarikatnya kepada anak syarikat PMSB, ini akan memprejudiskan pemiutang defendan yang lain yang hanya layak untuk berkongsi secara *pari passu* aset lain defendan, sekiranya ada. Tiada keretangan dihadap mahkamah bahawa kebolehan anak syarikat defendan untuk membayar hutang mereka kepada anak syarikat PMSB. Satu perintah relif spesifik terhadap defendan dalam keadaan sedemikian akan memnbuka pengara defendan kepada kebarangkalian perintah penghinaan mahkamah (lihat perenggan 42–43 & 45).

(6) Perlaksanaan spesifik tidak akan diperintahkan sekiranya perintah tersebut tidak pasti dengan skopnya, sebagai contoh, sekiranya wujud keraguan berkenaan dengan jumlah sebenar hutang, atau sekiranya jumlah tersebut hanya boleh ditentukan selepas usaha pengiraan. Mahkamah tidak boleh dibebankan dengan tanggunghawab untuk mengawal selia pelaksanaan dan pematuhan perintah perlaksanaan spesifik untuk menafsir skop tanggungjawab atau menyelesaikan isu sampingan yang timbul daripada penyelesaian akaun. Ini bukan sahaja akan memanjangkan litigasi dan meningkatkan kos, tetapi juga memerlukan masa kehakiman yang bernilai yang mana mahkamah tidak berniat untuk berbuat sedemikian (lihat perenggan 46–47 & 51–54).]

Cases referred to

Beswick v Beswick [1968] AC 58, HL (refd)
Broadcasting Investment Group Limited & Ors v Adam Smith & Ors [2020] EWHC 2501 (Ch), ChD (refd)
Co-operative Insurance Society Ltd v Argyil Stores (Holdings) Ltd [1998] AC 1, HL (refd)
Ewing International LP v Ausbulk Ltd (No 2) [2009] SASC 381, SC (refd)
Ferguson v Wilson (1866) LR 2 Ch App 77 (refd)
Foss v Harbottle (1843) 2 Hare 461 (refd)
George Fisher (Great Britain) Ltd v Multi Construction Ltd [1995] 1 BCLC 260 (refd)
Latin American Investments Ltd v Maroil Trading Inc [2017] EWHC 1254 (Comm), QBD (refd)
Lee Yee Wuen v Lee Kai Wuen & Ors [2020] MLJU 1902, CA (refd)
M Ratnavale v S Lourdenadin [1988] 2 MLJ 371, SC (refd)
Mac-Jordan Construction Ltd v Brookmount Erostin Ltd (in receivership) [1992] BCLC 350, CA (refd)
Pasedena (Holdings) Pty Ltd v Khouri (1977) 1 BPR 9490 (refd)
Prudential Assurance Co Ltd v Newman Industries Ltd and others (No 2) [1982] 1 All ER 354, CA (refd)
Richmond Pharmacology Limited v Chesters Overs & Ors [2014] EWHC 2692 (Ch), HC (refd)
Sevilleja v Marex Financial Ltd [2020] UKSC 31, SC (refd)
Sewell v Webster (1859) 29 LJ Ch 71 (refd)
Wilson v Northampton & Banbury Junction Ry Co (1874) LR 9 Ch App 279 (refd)

Legislation referred to

Companies Act 2016 ss 472, 528
Insolvency Act 1986
Specific Relief Act 1950 s 11(1)(d)

Michael Chow (Wendy Yeong and Wong Zhi Khung with him) (Michael Chow) for the plaintiff.
David Mathews (Malarvily Perumal with him) (Mathews Hun Lachimanan) for the defendant.

Ong Chee Kwan JC:

INTRODUCTION

[1] How does a company's insolvency affect the court's exercise of its discretion to grant specific performance? Can insolvency alone be sufficient to grant the specific reliefs? When would the reflective loss principle or the rule in *Prudential* apply — is it limited only to the first degree shareholder? Should the

court take on the burden of supervising the order for specific performance where there is uncertainty in the obligation? These are the issues for determination in this judgment.

BACKGROUND FACTS

[2] The subject matters of this originating summons ('OS') are two agreements entered into by the plaintiff, the defendant and Paparich Malaysia Sdn Bhd ('PMSB').

[3] The two agreements are:

(a) a share sale and subscription agreement dated 6 May 2014 ('SSA') where the plaintiff acquired:

(i) 4,474,697 ordinary shares in PMSB from the defendant who was at the time the holding company of PMSB for a total consideration of RM24m; and

(ii) 325,303 new ordinary shares of RM1 each in PMSB at issued price of approximately RM18.44 per share at a total subscription consideration of RM6m.

(b) a shareholders agreement dated 6 May 2014 ('SHA') where the Parties agree to operate PMSB as a holding company of the Malaysian Paparich Group for the purpose of carrying on the business of restaurant operator and franchisor and to regulate the parties' relationship inter se.

[4] Both the SSA and the SHA contain positive obligations on the part of the defendant to repay or cause to be repaid inter-company advances owed by the defendant and its subsidiaries to PMSB and its subsidiaries.

[5] More specifically, cl 7.2 of the SHA and cl 5.1(b) and (c) of the SSA read as follows:

SHA

7.2 Related transactions: All amount owing (non trade) to Paparich Malaysia group of companies by the Vendor's subsidiaries shall be fully settled within thirty six (36) months from the date of this Agreement and all amount owing to Roti- Roti International Sdn Bhd by the Vendors shall be settled in full by October 2015 by way of repayment to Roti-Roti International Sdn Bhd.

SSA

5.1 The Vendor undertakes to Agathis that:

(a) ...

(b) All amount owing (non trade) to Paparich Malaysia group of companies by the Vendors subsidiaries shall be fully settled within thirty six (36) months from the date of this Agreement; and

(c) All amount owing to Roti-Roti International Sdn Bhd ('Amount Owing') shall be settled in full by October 2015 by way of repayment to Roti-Roti International Sdn Bhd.

[6] The obligations of the defendant under cl 7.2 of the SHA and cl 5.2(b) and (c) of the SSA are substantively the same, namely, that the defendant undertakes to the plaintiff and PMSB that:

(a) the amounts due by the defendant's subsidiaries to 'Paparich Malaysia group of companies' shall be settled within 36 months from 6 May 2014; and

(b) the amount due by the defendant to Roti-Roti International Sdn Bhd shall be settled by October 2015.

[7] There is no dispute that the said clauses in SHA and SSA do not involve payment of any amounts to the plaintiff.

[8] The plaintiff contended that it has performed its obligations under the agreements but the defendant has breached its obligations under the said two clauses. The plaintiff therefore filed this OS seeking an order of specific performance of the two said clauses.

COURT'S ANALYSIS AND DECISION

[9] In the OS, the plaintiff is seeking for specific performance of cl 7.2 of the SHA and cl 5.1(b) and (c) of the SSA ' by the defendant and its subsidiaries ...' and for damages to be assessed.

[10] Since the subsidiaries are not parties to the SHA and the SSA, the order for specific performance, if any, can only be against the defendant requiring the defendant to meet its undertaking for the amounts owing to be settled.

[11] At the time of the hearing, the defendant was a company subject to two winding up petitions which were presented on 15 May 2020 and 22 May 2020. The latter winding up petition was presented by the plaintiff. It is not in dispute that the defendant is insolvent.

[12] Section 472 of the Companies Act 2016 ('the CA 2016') provides that any disposition of the company's property after the presentation of winding up petition is void unless ordered otherwise by the court.

[13] An order for specific performance as prayed would compel the defendant to make payments to Paparich Malaysia group of companies and to Roti-Roti International Sdn Bhd. This would constitute a void disposition unless validated by the winding up court.

[14] Also, any payment made by the defendant pursuant to an order for specific performance could potentially amount to undue preference under s 528 of the CA 2016 in the event of the defendant is wound up within six months from the date of the payments.

[15] In *Mac-Jordan Construction Ltd v Brookmount Erostin Ltd (in receivership)* [1992] BCLC 350, the English Court of Appeal declined to order specific performance precisely because it may give rise to a preference under the Insolvency Act 1986:

> It is at this point that I should mentioned the doubts I feel regarding the specific enforceability of an obligation to set aside a retention fund. In a case where the employer is insolvent when the application for a mandatory order, would, assuming it were complied with, give preference to a contractor as against other unsecured creditors, I do not see any reason why he court should do such a thing. If the directors of an insolvent company were, pursuant to a clause such as cl 30-4.2.1, to set aside a retention fund for the benefit of a building contractor, questions of preference might well arise (see s 239 of Insolvency Act 1986). So far as preference is concerned, the appropriation of assets to constitute the retention fund would be no different, in my opinion, from the payment of any other debt ...

[16] For the aforesaid reason, this is clearly not a suitable case for the court to exercise its equitable jurisdiction to order specific performance as it would require the defendant to act contrary to a statute (see *Sewell v Webster* (1859) 29 LJ Ch 71).

[17] In any event, the defendant is insolvent and an order for specific performance against the defendant will be futile as the defendant has no means to meet the obligation to pay. The court will not order specific performance against a party who is in no position to perform the same (see *Ferguson v Wilson* (1866) LR 2 Ch App 77).

[18] The plaintiff had sought to rely *Pasedena (Holdings) Pty Ltd v Khouri* (1977) 1 BPR 9490, arguing that financial hardship is not a bar to an order of specific performance. In that case, Holland J held:

> A purchaser who pleads hardship as a defence to a vendor's claim that the purchaser be ordered specifically to perform the bargain into which he has entered has to meet and overcome the principle that specific performance is not a remedy which should lightly be refused when the vendor has established the existence of a valid contract that equity ordinarily decrees to be specifically performed which the purchaser has

declined to complete: Fullers *Theatres Ltd v Musgrove* (1923) 31 CLR 524 at pp 548–9; *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at p 438. On the authorities, I doubt whether difficulty confronting a purchaser in finding the purchase money could, by itself, constitute sufficient reason to deny a vendor an order for specific performance. Financial hardship generally appears as only one ingredient in a group of circumstances which would make specific performance work a clear injustice to the defendant.

[19] With respect, the *Pasadena* case was a case dealing with 'financial hardship' and not a case where the defendant was hopelessly insolvent. That this is so is clear from the following opening passage of the reported judgment:

The most that I would be prepared to find from the evidence placed before the court on behalf of the defendants is that for some time since the contract was made and at present they have been under financial pressures, that these would be aggravated if they were forced to complete their contract with the plaintiff and that bit is not commercially convenient for them to do so; but, in my opinion, they have failed to establish a case of impossibility or the kind of hardship which would lead the court, in its discretion, to deny to a vendor an order for specific performance to which he was otherwise entitled.

[20] The plaintiff's claim is also infirmed by the 'reflective loss' principle and the rule that specific performance will not be granted where damages is adequate remedy.

[21] Throughout submissions, the plaintiff had maintained that it has suffered loss in the form of the diminution in value of its shares in PMSB.

[22] In response, the defendant contended that the plaintiff's claim is a mere reflection of the loss sustained by PMSB and its subsidiaries and is therefore barred from pursuing such claim as the proper party to make the claims would be PMSB and its subsidiaries.

[23] The 'reflective loss' principle or the 'rule in *Prudential*' was recently clarified by the UK Supreme Court in *Sevilleja v Marex Financial Ltd* [2020] UKSC 31. In essence, the majority judgment of the Supreme Court clarified that the reflective loss principle or the rule in *Prudential* is not rooted in the prevention of double recovery arising from concurrent claims where a payment to one will have the practical effect of remedying the loss suffered by the other. In the context of a claim by a shareholder for loss in the diminution of his share value or its distribution, the rule bars the shareholder from pursuing its claim against the wrongdoer (even if the company does not pursue its own right of action) because the shareholder does not suffer a loss which is recognised in law as having an existence distinct from the company's loss. This is based on the rule in *Foss v Harbottle* (1843) 2 Hare 461 that states that the only person who

A can seek relief for an injury done to the company, where the company has a cause of action, is the company itself.

[24] The UK Supreme Court further held that the reflective loss principle has no application to losses suffered by a shareholder which were distinct from
B the company's loss or in situations where the company had no cause of action.

[25] *Sevilleja v Marex Financial Ltd* [2020] UKSC 31 has been cited with approval by our Court of Appeal in *Lee Yee Wuen v Lee Kai Wuen & Ors* [2020] MLJU 1902 albeit in the context of the application of the reflective principle to
C an oppression claim.

[26] For Lord Reed's judgment who represented the majority decision in *Sevilleja Marex Financial Ltd*, for the reflective loss principle to apply there
D must be concurrent claims by the shareholder and the loss-suffering company.

[27] The plaintiff in this case is a 'first degree' shareholder of PMSB and a 'second degree' shareholder in the various subsidiaries of PMSB.

E

[28] PMSB, being a party to the SSA and SHA, has a cause of action for breach of contract against the defendant for failing in its undertaking that all amount owing (non trade) by its subsidiaries to Paparich Malaysia group of companies be settled within 36 months from the date of the agreements and
F failing to pay Roti-Roti International Sdn Bhd by October 2015 or after the extension to 2017. There is therefore a concurrent claim vested in the loss-suffering company ie PMSB, to bring into play the reflective loss principle.

[29] In my judgment, insofar where the plaintiff's claim is in respect of losses
G which it had suffered in its capacity as a first degree shareholder of PMSB in the form of a diminution in share value or in distributions consequent upon the loss sustained by PMSB and in respect of which PMSB had a separate cause of action against the defendant, this falls squarely within the reflective loss principle as enunciated by the UK Supreme Court in *Sevilleja v Marex*
H *Financial Ltd.*

[30] The case of *Latin American Investments Ltd v Maroil Trading Inc* [2017] EWHC 1254 (Comm) which the plaintiff relied upon where the shareholder had sought for an order for the payment of the contractual damages not to itself
I but to the company as a device to avoid double recovery is no longer good law *post Sevilleja v Marex Financial Ltd.* This is clear from the following passages by Lord Reed:

> 54. Those cases demonstrate how right the Court of Appeal was in *Prudential* in considering that the rule established in that case, based on the absence of separate

and distinct loss, was necessary in order to avoid the circumvention of the rule in *Foss v Harbottle* . The exception to that rule is the derivative action. Whether a shareholder can bring such an action depends on whether the relevant conditions are satisfied.

55. The most obvious difficulty with the avoidance of double recovery, as an explanation of the judgment in *Prudential*, is perhaps its unrealistic assumption that there is a universal and necessary relationship between changes in a company's net assets and changes to its share value. Another serious problem is its inability to explain why the shareholder cannot be permitted to pursue a claim against a wrongdoer where the company has declined to pursue its claim or has settled it at an undervalue, and the risk of double recovery is therefore eliminated in whole or in part.

[31] Hence, the fact that the plaintiff is seeking specific performance to compel the defendant to pay sums due to PMSB and not to itself does not avoid the reflective loss principle.

[32] However, the plaintiff contended that its loss in the form of diminution of its share value is also caused by the defendant's failure to pay the subsidiaries of PMSB or to cause the defendant's subsidiaries to pay the subsidiaries of PMSB. This results in a loss to PMSB which in turn results in a loss to the plaintiff. Here, the plaintiff is claiming as a 'second degree' shareholder. In reliance on *Broadcasting Investment Group Limited & Ors v Adam Smith & Ors* [2020] EWHC 2501 (Ch), the plaintiff contended that it is not caught by the reflective loss principle.

[33] In that case, Andrew Simmonds QC sitting as Deputy Judge of the High Court held that the rule in *Prudential* has no application to a non-shareholder of the suffering company. He gave his reasons in para 64 of the judgment as follows:

(1) The judgments of the majority of the Supreme Court in Marex make it clear that the rule only bars claims by shareholders in the loss-suffering company: see per Lord Reed at [89].

(2) The descriptions of the rule in the judgments of Lord Reed and Lord Hodge ('highly specific exception ... having no wider ambit' at [9]; 'the unique position in which a shareholder stands in relation to his company' at [51]; 'that is the full extent of the 'principle' of reflective loss' at [100] are antipathetic to any incremental extension of the rule to non-shareholders, whatever policy justifications may be advanced for such an extension.

(3) The fact is that a second degree, or third degree, shareholder (as I have described them) is not, in fact or in law, a shareholder in the relevant company. To blur that distinction is to ignore the separate legal personality of the companies which form the intervening links in the chain between

A the claimant and the loss-suffering company. Whilst in certain limited circumstances it is permissible for a court to 'pierce the corporate veil', as explained by the Supreme *Court in Prest v. Petrodel Resources Ltd* [2013] 2 AC 415, none of those circumstances apply to Mr Burgess's claim (see also the analysis of the Court of Appeal in *IBM UK Holdings Ltd v Dalgleish* [2018] PLR 1 at [364]–[369]).

B

[34] Whilst I agree that the plaintiff's loss in its capacity as second degree shareholder vis a vis the amount owing by the defendant's subsidiaries to the subsidiaries of PMSB, is not barred by the reflective loss principle, I prefer to C rely as my ground for holding so on the fact that there are no concurrent claims vested in these loss-suffering companies, i.e the subsidiaries of PMSB against the defendant. This is because the subsidiaries of PMSB are not parties to the SSA and SHA. The debts to these subsidiaries are not owed by the defendant but by its subsidiaries.

D

[35] The plaintiff's claim as a second degree shareholder in the present case are analogous to the case of *George Fisher (Great Britain) Ltd v Multi Construction Ltd* [1995] 1 BCLC 260 where the shareholder (the plaintiff E company) could sue the defendant for breach of contract for installing defective equipment at the premises of its subsidiary causing the company to suffer loss in the form of reduced profits from its subsidiary which had no cause of action against the defendant.

F **[36]** But in my judgment, the plaintiff's claim for specific performance in respect of the amount owing by the defendant's subsidiaries to PMSB's subsidiaries, being an equitable remedy, cannot be granted when damages is an adequate remedy. Lord Selbourne in *Wilson v Northampton & Banbury Junction Ry Co* (1874) LR 9 Ch App 279 explained that ' the court gives G specific performance instead of damages, only when it can by that means do more perfect and complete justice'.

[37] The plaintiff's loss in the diminution of its share value is monetary in nature. It can also be computed. Acknowledging the aforesaid, the plaintiff H sought to justify its claim for specific performance on the ground that the defendant is insolvent which renders any order of damages illusory and ineffective in compensating the plaintiff for the defendant's breach. Plaintiff referred to s 11(1)(d) of the Specific Relief Act 1950 which states:

I 11. *Cases in which specific performance enforceable*

(1) Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the court, be enforced —

(d) When it is probable that pecuniary compensation cannot be got for the non-performance of the act agreed to be done.

ILLUSTRATION

A transfers without endorsement, but for valuable consideration, a promissory note to B. A becomes insolvent, and C is appointed his assignee. B may compel C to endorse the note, for C has succeeded to A's liabilities and a decree for pecuniary compensation for not endorsing the note would be fruitless.

[38] Reference was also made to the Supreme Court of South Australia in *Ewing International LP v Ausbulk Ltd (No 2)* [2009] SASC 381 where at paras 352–355 the court held:

352. In order for a court to order specific performance, common law damages must not be an adequate remedy in the circumstances. Ausbulk contends that, in relation to the breach of contract by Ewing, damages would be an inadequate remedy. It would be inadequate because the circumstances of Ewing's financial position are such that any remedy for damages would be insufficient relief for its breach. There seems to be no dispute between the parties that Ewing is impecunious. This can also be seen from the financial records of Ewing which were tendered at trial.

352. Lord Selborne in *Wilson v Northampton* and Banbury Junction Railway Co stated (at 184):

The court gives specific performance instead of damages only when it can by that means do more perfect and complete justice.

354. Further, as Windeyer J stated in *Coulls v Baggot's Executor* and Trustee Co Ltd (at 503):

> There is no reason today for limiting by particular categories, rather than by general principle, the cases in which orders for specific performance will be made.

355. There are differing views as to whether a remedy of damages becomes inadequate simply by reason of possible insolvency of the defendant. Spry, after canvassing the various cases, expresses the view that, whilst doubts have been express as to the case law on insolvency of the defendant (at 68):

[i]t appears to be clear that a significant risk that a legal remedy such as damages will be ineffective on the ground pf inadequate resources of the defendant or otherwise, may of itself justify the conclusion that it is inadequate. Further, even a very slight risk of insolvency on the defendant may be decisive, especially in combination with other matters that tend to show that only if the plaintiff is given specific relief in equity will be sufficiently protected.

[39] The issue is this: where the plaintiff predicates his inadequacy of his remedy at law for a breach of contract not on the uniqueness of the chattel or the speculative nature of his damages, but solely on the insolvency of the defendant, is it a sufficient basis for the court to grant the specific reliefs? In other words, is insolvency alone be sufficient for specific performance?

A **[40]** To begin, the defendant rightly highlighted that both the winding up petitions against the defendant were filed about three months after the OS was filed. The insolvency of the defendant was not expressed as the ground relied upon for the specific reliefs by the plaintiff in the OS. In fact, the plaintiff took the position that 'the solvency of the defendant is not relevant'. But, by the time B the OS came before the court for hearing, the plaintiff had pinned its claims for specific performance on the defendant's insolvency, arguing that any damages for breach of contract would be fruitless.

C **[41]** With respect, the plaintiff cannot be allowed to blow hot and cold. The plaintiff had elected to file the OS for specific performance on the ground that the solvency of the defendant is irrelevant. The plaintiff cannot now reprobate from its position and seek to now anchor its claim on the insolvency of the defendant.

D **[42]** In any case, while I accept that the remedy at law for damages would be rendered fruitless by virtue of the defendant's insolvency, I do not accept that this alone is sufficient reason to grant the specific reliefs prayed for. The court must also consider if third parties will be prejudiced by an order for specific E performance.

[43] If the defendant is ordered to specifically perform its undertaking to settle its subsidiaries' debts due to PMSB's subsidiaries, this will be prejudicial to the defendant's other creditors who will only be entitled to share *pari passu* F in the remaining assets of the defendant, if any.

[44] But, the plaintiff contended that in respect of debts due by the defendant's subsidiaries, cl 7.2 of the SHA and cl 5.1(b) and (c) of the SSA merely require the defendant to cause its subsidiaries to pay PMSB and its G subsidiaries. Such obligations would not contravene ss 472 and 528 of the CA 2016 at all.

[45] Even if it can be accepted that cl 7.2 of the SHA and cl 5.1(b) and (c) of the SSA merely obliged the defendant to cause its subsidiaries to settle the debts H (giving rise to no disposition by the defendant), there is no evidence placed before this court to demonstrate that the defendant's subsidiaries have the ability to pay the subsidiaries of PMSB of their respective debts. An order of specific reliefs against the defendant in such circumstances would unnecessarily expose the directors of the defendant to the possibility of contempt of the court I order.

[46] A further problem to the plaintiff's claim for specific performance is the uncertainty in the actual obligations stated in cl 7.2 of the SHA and cl 5.1(b) and (c) of the SSA. According to the plaintiff, the obligation is to settle all

amount owing *at the time of settlement*. On the other hand, the defendant contended that the obligation is to settle only amount owing *as at the date of the SHA and SSA* as the purchase consideration and the subscription consideration for the PMSB shares under the SSA were pegged to the amount owing by the defendant and its subsidiaries to PMSB and its subsidiaries as at the date of the agreements.

[47] It will cause considerable hardship to the defendant and its directors, in particular, to comply with an order that is uncertain in its scope.

[48] Learned counsel for the plaintiff urged this court to give an interpretation of the relevant clauses that is most likely to give effect to the commercial purpose of the agreements. This, learned counsel for the plaintiff contended, will put to rest the uncertainty of the obligations.

[49] With respect, the answer to this contention is contained in the judgment of Stephen Jourdan QC sitting as a deputy High Court judge in *Richmond Pharmacology Limited v Chesters Overs & Ors* [2014] EWHC 2692 (Ch) which was cited by the plaintiff. The principles of interpretation applicable to a contract apply in respect of shareholders agreement and even a share sale agreement. At para [44], these are stated thus:

(a) the aim is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. The relevant reasonable person is one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract;

(b) this aim is achieved by a unitary exercise in which the court considers the language used and ascertained what that reasonable person would have understood the parties to have meant by that language. In doing so, the court must have regard to all the relevant circumstances and consider the practical consequences of each possible interpretation. The more unreasonable the result of one interpretation is, the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear. The exercise is an iterative process, involving checking each of the rival meanings against other provisions of the document and investigating its commercial consequences. It extends to placing the rival interpretations of a phrase within their commercial setting and investigating their commercial consequences;

(c) where the parties have used unambiguous languages, the court must apply it. The courts cannot rewrite the language which the parties used in order to make the contract conform to business common sense. But

language is a very flexible instrument and, if it is capable of more than one construction, the court chooses that which seems most likely to give effect to the commercial purpose of the agreement. If an interpretation is one which seems commercially improbable, only the most unambiguous of clauses could properly be found to bear that interpretation. Words ought to be interpreted in the way in which a reasonable commercial person would construe. And the reasonable commercial person is unimpressed with technical interpretations and undue emphasis of niceties of language;

(d) the poorer the quality of the drafting, the less willing the court should be to be driven by semantic niceties to attribute to the parties an improbable and unbusinesslike intention, if the language used, whatever it may lack in precision, is reasonably capable of an interpretation which attributes to the parties an intention to make their contract on a sensible and businesslike basis;

(e) the court consider the natural and ordinary meaning of those words, the overall purpose of the document, any other provisions of the documents, the facts known or assumed by the parties at the time that the document was executed, and common sense, but should ignore evidence of any party's understanding of what the document was intended to mean or did mean;

(f) although the court must consider commercial common sense, the parties should not be subjected to the individual judge's own notion of what might have been the sensible solution to the parties' conundrum and still less should the issue of construction be determined by what seems like commercial common sense from the point of view of one of the parties to the contract. The court must be wary of assuming it knows what is or is not commercially sensible; and

(g) the question of whether a term is to be implied involves the same approach as interpreting the words used. A term will not be implied unless the consequences if not making the implication would contradict what 'any' (rather than 'a') reasonable person would understand the contract to mean. Implication of the term must be necessary to ensure that the agreement achieves the parties' express agreement, purposively construed against the admissible background, and it is not enough that the term is reasonable.

[50] Although the court must consider commercial common sense in the interpretation of cl 7.2 of the SHA and 5.1(b) and (c) of the SSA, it requires evidence of the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract and have regard to the relevant surrounding circumstances as aid to

the interpretation of the same. This cannot be had in the present application by way of an originating summons.

[51] Moreover, even if the amount owing can be said to be the amount outstanding at the time of settlement as contended by the plaintiff, there is a need to work out the exact sums actually owed by each subsidiary as the defendant is not in agreement with the figures placed before this court by the plaintiff. The debt positions had not remain static since the SHA and SSA were executed as there were some repayments made and further debts incurred. There may also be issues of set off that would require some working out.

[52] For orders of specific performance, the rationale and need for certainty in the terms of the order was emphasised by the House of Lords in *Co-operative Insurance Society Ltd v Argyil Stores (Holdings) Ltd* [1998] AC 1 in these terms:

> One such objection, which applies to orders to achieve a result and a fortiori to orders to carry on an activity, is imprecision in the terms of the order. If the terms of the court's order, reflecting the terms of the obligation, cannot be precisely drawn, the possibility of wasteful litigation over compliance is increased. So is the oppression caused by the defendant having to do things under threat of proceedings for contempt. The less precise the order, the fewer the signposts to the forensic minefield which has to traverse. The fact that the terms of a contractual obligation are sufficiently definite to escape being void for uncertainty, or to found a claim for damages, or to permit compliance to be made a condition of relief against forfeiture, does not necessarily mean that they will be sufficiently precise to be capable of being specifically enforced ...

[53] The plaintiff had suggested that the orders for specific performance can be made with further orders for the parties to come to court to work out the details on the actual sums due. This includes even varying the order in cases where the subsidiaries are found to be incapable of making the payments.

[54] The plaintiff's said invitation, if accepted, will lead to this court being burdened with the task of supervising the execution and compliance of the orders; to interpret the scope of the obligations and to resolve incidental issues arising from the settling of the accounts. Not only will this mean protracting the litigation and increasing the costs, it will also require unnecessary investment of precious judicial time which this court is not inclined to do.

[55] In a final attempt, the plaintiff sought to rely on an alternative ground for the orders of specific performance — citing the following passage in *Snell's Equity* (32nd Ed) para 17–011:

> (d) In most cases a monetary remedy of damages or the action for an agreed sum will be an adequate remedy for breach of a contract for the payment of money, but in exceptional cases such a contract may be specifically enforced. This may occur

> where the action for an agreed sum would be unavailable or unsuitable*, such as where the contract is to pay a third party, so that damages recoverable by the contracting party would be merely nominal*, or where the contract is to make periodical payments, requiring a multiplicity of actions at law to enforce payment. Although the third party cannot himself sue on the contract, he can enforce any order for specific performance which the contracting party obtains ... (Emphasised added.)

[56] This contention is a departure from the plaintiff's submission that it had sustained damages in terms of the diminution of its share value. The thrust of the submission based on diminution of share value is that the plaintiff had sustained substantial damages but is unable to recover any meaningful damages from an insolvent defendant, hence the need for an order for specific performance.

[57] On the other hand, the basis for the new contention is that the plaintiff's damage is merely nominal and an order for damages would not meet the bargain made for the amount owing by the defendant's subsidiaries to PMSB's subsidiaries to be settled by an agreed date which had been breached. The case of *Beswick v Beswick* [1968] AC 58 was referred as an authority for this proposition.

[58] Quite apart from the fact that the plaintiff's argument is based on an inconsistent stance, the case of *Beswick v Beswick* can be easily distinguished as in that case, the issues set out in paras 43–54 above which plague an order for specific performance were not present.

[59] The defendant also submitted that the plaintiff's claim for specific performance is barred by laches.

[60] Our Supreme Court in *M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371 held that the conduct of the applicant is a material consideration:

> However, the discretion is not an arbitrary or capricious discretion but it is to be exercised on fixed principles. The conduct of the plaintiff such as delay or laches or breach on his part or some other circumstances outside the contract may render it inequitable to grant the remedy of specific performance.

[61] The defendant contended that the plaintiff has not provided any cogent explanation as to why it did not make the claim timeously. The agreements provide for the defendant to meet its undertaking to settle the debts 'within thirty six (36) months from the date of this Agreement' in respect of the amount owing by the defendant's subsidiaries and 'by October 2015' in respect of the defendant's debt to Roti-Roti International Sdn Bhd. Although the obligations were extended to 2017, the plaintiff only filed this application in 2020, a good three years later.

[62] According to the defendant, the need for an explanation is imperative when one considers that the agreements contemplated that 'the parties will jointly explore the exit strategy of the Company at the end of three (3) years form the date of this Agreement ...'.

[63] The maxim that delay defeats equities or equity aids the vigilant and not the indolent is not without qualification. In this connection, the following passage from *Snell's Equity* (32nd Ed) para 5–019 is instructive:

> Laches essentially consists of a substantial lapse of time coupled with the existence of circumstances which make it inequitable to enforce the claim in equity. The first of these circumstances is a reasonable, and detrimental reliance by the defendant upon the claimant's delay. Lord Neuberger has recently held that 'some sort of detrimental reliance is usually an essential ingredient of laches. Alternatively, if is necessary for there to be some clear act of the claimant which amounts to an acquiescence or waiver of his rights.

[64] In my judgment, the defendant has not shown any detrimental reliance arising from the plaintiff's delay in enforcing the obligations under cl 7.2 of the SHA and cl 5.1(b) and (c). Neither do the facts support an intention by the plaintiff to waive or abandon the claims. For this reason, I do not accept that laches applies in this case as an answer to the plaintiff's application.

[65] Finally and for completeness, I would like to deal with the claim by the plaintiff for its loss in its capacity as a second degree shareholder in respect of the loss to its share value due to the defendant's failure to settle its repayment to Roti-Roti International Sdn Bhd. Unlike the amount owing by the defendant's subsidiaries to PMSB's other subsidiaries, there is in this case a direct debt due from the defendant to Roti-Roti International Sdn Bhd. This means that there is vested in Roti-Roti International Sdn Bhd a cause of action against the defendant.

[66] But I do not agree that the reflective loss principle has no application to a second or third degree shareholder as held by Andrew Simmonds QC in *Broadcasting Investment Group Limited & Ors v Adam Smith & Ors* [2020] EWHC 2501 (Ch).

[67] It is a strange result indeed that a claim by a second degree shareholder for loss in the diminution of his share value or its distribution is recognised as a separate and distinct loss when the rule bars the first degree shareholder from pursuing its claim against the wrongdoer (even if the loss-suffering company does not pursue its own right of action) on the ground that the first degree shareholder does not suffer a loss which is recognised in law as having an existence distinct from the loss-suffering company's loss.

[68] The rationale for not recognising a separate and distinct claim vested in a first degree shareholder for his loss in diminution of his share value is that the company's control over its own cause of action would be compromised and the rule in *Foss v Harbottle* could be circumvented. In my opinion, this rationale applies with equal force in the case of the second degree shareholder's claim in that the first degree shareholder company's claim would be compromised if the second degree shareholder's claim is recognised as a separate and distinct claim.

[69] According, I respectfully disagree with the decision of Andrew Simmonds QC and hold that the plaintiff's claim against the defendant in respect of the loss arising from the defendant's breach of its obligation to pay Roti-Roti International Sdn Bhd is also barred by the reflective loss principle.

CONCLUSION

[70] For the reasons aforesaid, the plaintiff's claims under the OS is hereby dismissed with costs fixed at RM20,000 subject to payment of allocator.

[71] Although the OS also claimed for damages to be assessed, this was prayed as an addition to the orders for specific performance. Having elected to affirm the agreements, the plaintiff cannot be permitted to ask for damages which is based on the alternative basis of termination of the agreements.

Order accordingly.

Reported by Ashok Kumar